

**IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MONTANA
BUTTE DIVISION**

DAVID STEVEN BRAUN,

Plaintiff,

v.

BANK OF AMERICA,

Defendant.

CV-17-72-BU-BMM-JCL

**ORDER ADOPTING MAGISTRATE
JUDGE'S FINDINGS AND
RECOMMENDATIONS**

United States Magistrate Judge Jeremiah C. Lynch entered findings and recommendation on November 30, 2017, that this action be dismissed based on Defendant Bank of America's motion to dismiss and the doctrine of res judicata. Judge Lynch determined that Plaintiff David Braun's independent allegations under the Fair Debt Collection Practices Act and 42 U.S.C. § 1983 failed to state claims upon which relief could be granted. This Court adopted the referenced recommendation and dismissed the action with prejudice on January 4, 2018.

Plaintiff filed two actions subsequent to this Court's dismissal. (Docs. 26-27). Plaintiff first requested that the Court produce records of any ex-parte communication that may have occurred in this case. Judge Lynch denied the motion because no ex-parte communication had occurred. (Doc. 28). Plaintiff then requested to modify the dismissal in this action to be without prejudice pursuant to Fed. R. Civil. P. 60(b)(1) & (6). Judge Lynch issued an Order and

Findings and Recommendation on this matter on August 27, 2018. (Doc. 28).

Judge Lynch recommends this Court deny Plaintiff's motion to modify the dismissal of the action. (Doc. 28 at 2-3).

No party filed objections to Judge Lynch's Findings and Recommendation.

The Court has reviewed the Findings and Recommendation for clear error.

McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). The Court finds no error in Judge Lynch's Findings and Recommendation and adopts them in full.

Judge Lynch recommended that the Court deny Plaintiff Braun's motion to modify the dismissal of the action. Judge Lynch recommended that Braun's arguments do not provide grounds for modifying the dismissal of his claims in this case with prejudice. Rule 60(b)(1) allows the Court to relieve a party from a final judgment for various reasons including "surprise." The Court's proper analysis and application of the doctrine of res judicata, and the law under the Fair Debt Collection Practices Act and 42 U.S.C. § 1983, do not qualify as an unfair "surprise" that would warrant a modification of the dismissal in this case. *See In re Braga*, 272 F.R.D. 621, 625 (S.D. Florida 2011).

ORDER

Accordingly, **IT IS ORDERED** that Magistrate Judge Lynch's Findings and Recommendation (Doc. 28) is **ADOPTED IN FULL**.

IT IS FURTHER ORDERED that Defendant's Motion to Modify the Dismissal of this Action (Doc. 27) is **DENIED**.

DATED this 22nd day of October, 2018.



Brian Morris
United States District Court Judge